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April 18, 2011

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Room TW-A325
Washington, DC 20554

Re: *Comments of Allband Communications Cooperative*

In the matter of:

Connect America Fund, WC Docket No. 10-90

A National Broadband Plan for Our Future, GN Docket No. 09-51

Establishing Just and Reasonable Rates for Local Exchange Carriers,
WC Docket No. 07-135

High-Cost Universal Service Support, WC Docket No. 05-337

Developing an Unified Intercarrier Compensation Regime,
CC Docket No. 01-92

Federal-State Joint Board on Universal Service, CC Docket No. 96-45

Lifeline and Link-Up, WC Docket No. 03-109

Dear Ms. Dortch:

Pursuant to the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (NPRM/FNPRM) issued in the above-referenced dockets, Allband Communications Cooperative is submitting its attached comments by electronic filing. In accordance with the Commission's directions, we are also sending a copy via e-mail to Cathy Williams, Nicholas A. Fraser, and PRA@fcc.gov.

Respectfully submitted,

Allband Communications Cooperative,

By its counsel

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DLK/cd
Atts.

Before the
Federal Communications Commission
Washington, D.C. 20554

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COMMENTS OF
ALLBAND COMMUNICATIONS COOPERATIVE

Dated: April 18, 2011

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Counsel for Allband Communications Cooperative

I. INTRODUCTION

Allband Communications Cooperative (Allband), a Michigan based non-profit cooperative, welcomes the opportunity to address the proposals offered by the Federal Communications Commission (Commission) in this proceeding, pursuant to the Commission's Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (NPRM/FNPRM). Allband hopes that this comment process will convince the Commission to revise and refine its proposals so that the final rules are both innovative and constructive, but also lawful and reasonable.

While the Commission may be seeking to promote some laudable goals and objectives in part, certain aspects of the Commission's proposed rules should be modified or cancelled. In particular, the Commission may be trying to implement changes which are too broad, or which are unlawful and unreasonable.

Allband's comments seek to provide the Commission more information concerning the unique status and history of Allband, along with Allband's concerns that some of the Commission's proposals are unlawful and unreasonable in part. Allband also asserts that the Commission's rulemaking proposals, if not modified, will have dire destructive impacts upon Allband specifically, and may result in less universal service and broadband in rural areas across the country. Allband herein also offers some constructive input to assist the Commission in revising and refining its proposed rules.

II. ALLBAND MEETS ALL OF THE STANDARDS AND REQUIREMENTS OF THE USF, AND ALSO THE GOALS AND OBJECTIVES OF THE COMMISSION IN ITS RULEMAKING.

A. The Commission's Goals and Objectives

Allband asserts that its unique situation and factual circumstances comport with all of the objectives and requirements of the USF provisions, and in reality all of the goals and objectives sought to be achieved by the Commission's rulemaking. However, certain sections of the specific proposals in the Commission's rulemaking appear to be inconsistent or contrary to these goals and objectives. The Commission's Rulemaking (paragraph 10) states in relevant part:

Consistent with the Joint Statement and the Broadband Plan, the Commission plans to be guided by the following four principles, rooted in section 254, as we proceed with USF and ICC reform:

- *Modernize USF and ICC for Broadband.* Modernize and refocus USF and ICC to make affordable broadband available to all Americans and accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile broadband networks....
- *Fiscal Responsibility.* Control the size of USF as it transitions to support broadband, including by reducing waste and inefficiency....
- *Accountability.* Require accountability from companies receiving support, to ensure that public investments are used wisely to deliver intended results....
- *Market-Driven Policies.* Transition to market-driven and incentive-based policies that encourage technologies and services that maximize the value of scarce program resources and the benefits to all consumers.¹⁶

¹⁶ We recognize that in some geographic areas there may be no private sector business case for offering voice and broadband services. This is not in tension with our commitment to use market-driven regulation.

The Commission's NPRM (paragraph 80) states in relevant part:

Consistent with the statute and the Joint Board recommendations, we propose four specific priorities for the federal universal service high-cost program. *First*, the program must preserve and advance voice service.... *Second*, we seek to ensure universal deployment of modern networks capable of supporting necessary broadband applications as well as voice service.... *Third*, the program must ensure that rates for broadband service are reasonably comparable in all regions of the nation.... *Fourth*, we seek to limit the contribution burden on households. As we have recognized in the past, "if the universal service fund grows too large, it will jeopardize other statutory mandates, such as ensuring affordable rates in all parts of the country, and ensuring that contributions from carriers are fair and equitable."¹²⁵

¹²⁵ *Qwest II Remand Order*, 25 FCC Rcd at 4087, para. 28.

The Commission has indicated in its proposed rulemaking concerns that the Universal Service (USF) funds can be more efficiently utilized, so as to eliminate certain undefined “waste and inefficiencies”. The Commission has also expressed its interest in stretching the USF dollars to attain more access to communications on a national basis, with some apparent emphasis on broadband and wireless technologies. The Commission also wants to ensure that USF funding, and surcharges on customer bills to provide such funding on a national basis, does not become burdensome on communications customers (although there is not presented empirical evidence here that this threshold has occurred). The Commission also wants to address some perhaps abusive anomalies, and to exert more efforts to carry out its responsibilities relative to USF funding.

B. Allband's Unique Circumstances

Allband asserts that it constitutes a situation that is unique and highly successful, and where the USF has been properly and efficiently utilized, consistent with the established

statutory goals of the USF. The Commission's goals and objectives of its rulemaking therefore should not adversely affect Allband, assuming that the Commission will be further refining and modifying its rules in this proceeding.

Allband was formed by local residents in 2003, after extensive planning and organizational efforts, because certain large areas of northeast lower Michigan were wholly without communications services of any kind. Despite requests for service, large incumbent carriers such as GTE, Verizon and now Frontier, refused to provide any service in these areas. After striving to obtain service through several different options, the local residents had to adopt the option of forming a cooperative to provide such services and to apply for the necessary regulatory approvals and loans to design, engineer, and to construct facilities to provide such service.

On July 29, 2004, Allband filed a complete loan application with the Rural Utilities Service (RUS) of the U.S. Department of Agriculture (USDA). Also, in 2004, Allband filed the necessary application and associated testimony, exhibits, studies, and other information to obtain the necessary license from the Michigan Public Service Commission (MPSC) to provide communications services in the newly defined and created Robbs Creek Exchange, an area comprising 177-square miles in portions of four counties in northeast Michigan.

Also in 2004, based upon exhaustive filings and studies as part of its application to the RUS, Allband was approved for RUS funding and began the necessary planning to construct an all fiber, passive optical, state of the art telecommunications network in the Robbs Creek exchange that would allow Allband not only to provide standard telecommunications services, but also ubiquitous broadband and other advanced services.

In 2005, Allband applied for and obtained this Commission's waiver of certain FCC rules, which allowed Allband to be treated as an Incumbent Local Exchange Carrier for National Exchange Carrier Association (NECA) pooling and also USF purposes. *In the Matter of Allband Communications Cooperative Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules*, FCC WC Docket No. 05-174 (August 11, 2005). Also in 2005, the MPSC granted Eligible Telecommunications Carrier (ETC) status to Allband.

In 2006, Allband joined the NECA pools, which allowed Allband to minimize administrative expenses and to maintain reasonable and stable access rates.

In December 2006, USAC and NECA recognized Allband as an ILEC and began providing Interim Common Line Support and Local Switching Support. In January 2008, Allband began receiving High Cost Loop Support. This support has been used and will be used by Allband to recover a substantial portion of the ongoing high cost of providing ubiquitous network facilities and enables Allband to maintain reasonable local exchange consumer rate levels (\$19.90) per month for residential and business service.

The various loan agreements and mortgages entered into between Allband and the RUS were consummated only after the most rigorous review and investigation of all required engineering, market and service area aspects, and associated interviews and submission of extensive documentation. The RUS required a 5-year build out in the new Allband exchange. The RUS mortgages total in excess of \$8 million and provide for a 20-year amortization.

Allband's new exchange facilities were designed with the latest and most cost efficient technology and in a manner that would greatly decrease the risk of obsolescence and to increase the flexibility of the network to provide broadband and other advanced services over a longer timeframe. Because the new exchange was wholly without service, it represented a "Greenfield"

area, where the engineering and design could accomplish these objectives. After considerable study of various options, it was decided and proposed to build a network that would comprise a “fiber to the home” (FTTH) system, and to locate all fiber cables and lines underground rather than above ground. Since design and engineering, and labor, comprise a majority portion of construction costs, FTTH was determined to be the most cost effective and long lasting, and fiber costs were comparable to or lower than copper wire costs at the time. Also, a wireless or satellite system was not suitable for the area due to its heavily forested and hilly nature, and other geographical or topographical characteristics, and the nature of the area being subject to sometimes violent summer storms and winter blizzards. Wireless or satellite systems were not found to be less expensive, and would not have been reliable enough to fulfill Allband’s objectives to provide exchange service that could carry out important public service and safety functions. In sum, the construction of a FTTH network was found to be the most efficient and reliable technology, particularly on a longer-term basis. Allband's network has been designed to provide both voice and broadband services, and crucial life saving services (911) in its service area. Additionally, all of Allband's network loops were placed strategically to reach actual subscribers.

Allband's analysis in planning and constructing its network showed that technological neutrality might not be the best regulatory approach for rural areas such as Allband's territory. A reliable and long life technology such as FTTH was best suited as the foundation for the network, in contrast to a temporary "quick fix" system of less cost which would have been subject to fast technological obsolescence. Moreover, regulatory agencies, such as the MPSC, the RUS, and this Commission (e.g., waiver order, *supra*), were constantly advised of these plans and decisions and approved them in many respects.

Unlike many other companies, and perhaps national averages, Allband's landline subscription rate is steadily increasing, not decreasing, and additional subscriptions are coming on line as the network is being built out further to new customer locations in its Robbs Creek exchange. Allband's efficient and reliable network also serves as the backbone for constructing and expanding a range of services in the region which have and continue to enhance the economic development and quality of life in its community.

Allband was started to provide necessary service to local residents previously without service, and NOT as a means to collect USF revenues or to engage in "empire building". This is demonstrated by the history of Allband, and its establishment as a non-profit communications cooperative whose members reside in the service area and who are customers of Allband.

Allband asserts that it has thus been a highly successful entity which has provided ubiquitous, advanced, and "carrier of last resort" public safety services to its service area, all in accordance with the legal requirements, and the goals and objectives, of the statutory provisions and Congressional intent in establishing the USF. In this respect, Allband does not fit as a target for some of the Commission's reforms in this proceeding.

III. SEVERAL OF THE ABUSES OR CONCERNS CITED BY THE COMMISSION IN ITS RULEMAKING PROPOSAL DO NOT APPLY TO ALLBAND.

The Commission's rulemaking proposals discuss several concerns and targets for reform which simply have no applicability to Allband.

For example, the parent company trapping issue has no relevance to Allband's situation or factual circumstances.

The Commission's observation of a general decline in landlines nationally has no application to Allband for at least three reasons: (1) Allband's landlines are increasing as this

new service provider expands service to its service area as contemplated by all of its regulatory approvals; (2) Allband's network is so new that it comprises the most sensible and technologically flexible long-term service opportunities for all broadband and advanced services because it is FTTH, which is viewed as highly valuable to its customers; Allband is not hampered by old copper wire, above ground facilities, and decades-old engineered barriers; and (3) the impacts of the Great Recession on Michigan, which interrupted growth in Allband's service territory, appears to be reversing itself, leading to improved prospects going forward. Allband as a cooperative is also aided by its requirement that each cooperative member must subscribe to telephone/911 and cannot obtain internet/non-regulated services without an access line. This ensures a higher and more sustainable line count.

Allband is not an example of "waste and inefficiency". Its entire Staff is barebones but efficient, and necessary to conduct operations, provide maintenance, extend service to new customers, and to also meet all regulatory requirements of state and federal agencies relative to accounting, audits, reporting, taxes, and a number of other matters, which appear to be increased by the Commission's proposed rules. At the same time, the lean Allband Staff has provided the backbone for economic development in this region of Michigan, and for ensuring expansion of communications services, and for the enhancement of public safety and the public interest.

The Commission's concerns regarding arbitrage, and phantom traffic, have no applicability to Allband at this time, although it may raise concerns for the Commission in other situations.

Allband's overall rates and services also fall within a reasonable range when comparing urban and rural service, consistent with the requirements of the Federal Communications Act (the Act). As noted, Allband's basic rate is over \$19.90, which falls within this range of

reasonableness and does not constitute intent to gain unreasonably low subsidized rates to customers at the expense of the USF and other customers nationally.

The Commission's thesis that efficiency can result simply by increasing the "scope" and size of companies serving the country, and by somehow forcing a merger of small local, "grass roots" companies into the large national ever changing incumbents, is also in reality simplistic and over general. The problem with this thesis in part is that these same incumbents refused for all history to provide service in the territory that Allband now serves. The reality is that these same incumbents refuse or fail to provide any service in other nearby areas contiguous to Allband's area. The reality is that these same incumbents will always strive to serve the most profitable urban areas and will ignore rural areas. This inherent problem is why Congress created the USF fund in the Act in the first instance. Why should incumbents, armed with a record of failure and lack of interest to serve rural areas, now be rewarded by punishing entities like Allband that forthrightly and successfully filled the void as intended by the USF?

"Market-based" approaches to providing telephone and broadband services to America's rural customers is a laudable goal, as a matter of economic theory, but are limited by the economic realities dictated by for-profit corporate incentives. In this case, the proposed FCC rulemaking are overly theoretical from both regulatory and economic perspectives. It is elementary that large-scale, for-profit organizations are usually motivated by short-term, balance sheet returns and not by serving the "public interest". Accordingly, in northeast Michigan several large carriers refused to offer service, being under no regulatory or other requirement to do so. Now the FCC's rule changes would attempt to force the merger of several small, local companies into the same mold, without any market-driven economic incentive or other resources to do so. By artificially and arbitrarily limiting an existing company's USF per-line

compensation to \$3,000, the FCC's rules would undercut the viability of existing companies to provide such services and force Allband and similar existing companies out of business, an unjust and arbitrary punishment. Then, since no large company considers short-term profit to be sufficient to provide telephone and broadband service to rural America, there would be no (or inadequate) rural telephone and broadband service, completely contrary to existing national telecommunications policy as established by Congress in the Act. In effect, the result is "market" and policy failure. The assumption that "bigger is better" and that "one shoe fits all" in providing service in rural areas is simply erroneous as a matter of regulatory and economic theory, and is hopelessly self-serving, situational, and theoretical. While the existing conditions of the USF may require rule changes to promote "market" solutions in some areas, small independent companies serving rural areas should be exempted from so-called market solutions, which are likely to fail.

IV. THE COMMISSION'S PROPOSED RULES, IF NOT MODIFIED, WILL DESTROY ALLBAND FINANCIALLY ALONG WITH THE REVENUE STREAM NECESSARY TO MEET ITS LOAN OBLIGATIONS TO A SISTER FEDERAL AGENCY, THE RUS.

If current proposals are ordered as stated in the NPRM, Allband will be unable to properly operate and maintain its current level of superior service as required by both the FCC and the MPSC under current ETC requirements. As a carrier of last resort, Allband prides itself on providing a high level of customer service and reliability. If current Universal Funding mechanisms are reduced and/or removed, Allband will be unable maintain operational stability.

Based on a detailed analysis of the proposed USF reform (see attached), Allband projects that it will lose over \$800,000 in USF revenues per year. Allband needs and uses these USF revenues to pay back RUS loans and recover the higher than average expense of operating its

network. This totals more than 40% of Allband's revenues and is a reduction of over 60% in USF revenues per access line. With such a steep and sudden loss of revenue, Allband will be unable to pay the interest or repay the principal of its RUS loans and would be forced to cease operations.

Allband's rate of return will be reduced to an average of -5% per year and its TIER, a calculation used by RUS to assess the ability of its borrowers to pay back its loan, will be reduced to an annual average of 0.1. Allband is currently required to maintain a TIER of 1.42 per its RUS note. Current rate of return without the proposed reforms is predicated to fluctuate between 9% and 11% with a forecasted TIER of over 2.0 throughout 2014.

The Commission also appears to be under the impression that independents like Allband make enough money from non-regulated revenues that USF support is no longer needed. In fact, Allband has negative net revenue from its Internet/DSL service. Allband currently loses money due to its low subscriber density. The costs of providing Internet services such as broadband are shared over relatively few subscribers. Allband needs universal service cost recovery mechanisms to sustain affordable rates for telephone and broadband services. Currently, Allband requires significant USF support to recover costs essential to providing telephone and broadband services. Allband can't pass all or a significant portion of the recovery of these costs to its service rates. Most customers could not afford to pay the unreasonably high rates that would result from significant reductions in USF support. Allband cannot survive from non-regulated revenues alone. Quite simply, USF recovery does not subsidize or inflate Allband's financial accounts, but rather constitutes essential support for the recovery of costs necessary for Allband to stay operational and provide quality services at affordable rates.

It may be noted also that a reduction in support per line could result in sub-par technology (wireless), with less long-term viability and slower than average broadband speeds, which do not support consumer demand or the requirements or goals of universal service.

V. CERTAIN ASPECTS OF THE COMMISSION'S RULEMAKING PROPOSALS ARE UNLAWFUL, UNREASONABLE, ARBITRARY, AND CONTRARY TO APPLICABLE JUDICIAL PRECEDENT.

As a stand alone thesis, the Commission's goals and objectives for launching this rulemaking proceeding and for offering its initial proposals for reform are laudable. However, these goals and objectives can be subverted, and the rules rendered as being unlawful and unreasonable, if they are applied and implemented too broadly, or in a manner that fails to comport with applicable legal requirements set forth in federal constitutional and statutory provisions, and prevailing judicial precedent. On the other hand, with some perhaps modest changes, the rules could be modified or refined so as to achieve the overriding goals and objectives. However, Allband asserts that certain of the Commission's existing proposals in this rulemaking proceeding are unlawful, unreasonable, arbitrary, and contrary to applicable judicial precedent.

Allband has several legal concerns. A major concern is the proposal to limit USF High Cost Loop support to \$3,000 per line, effective upon the implementation of the rules instead of a long-term transitional period that would accommodate the honor of current loans and mortgages issued by the RUS in reliance upon the existing law and rules applicable to both this Commission and the RUS. Allband has followed all of the FCC's rules and requirements to provide voice and broadband service to customers who have never had service. The FCC's proposals change on a retroactive basis, the revenue recovery rules of a network that has already been deployed (effectively a retroactive disallowance of cost recovery).

A related issue involves the failure to provide for a grand-father provision, or uniform non-discriminatory exception, for Allband that would ensure that Allband continues to receive the revenue stream of USF funding in accordance with and reliance upon all of the existing rules, requirements, and any other known or foreseeable requirements, imposed by either the state or federal government or their agencies. While the Commission's proposed rules suggest possible exceptions for Hawaii, Alaska, Indian Tribes, or undefined "insular areas," the proposed rules fail to acknowledge that the logic and reasoning for such treatment to these entities applies to Allband. The rules appear to contemplate an afterword "ipse dixit" or "ad hoc" process of providing for winners and losers, and granting exceptions on a "case by case" basis without any rational criteria, standards, or legal authority.

Allband asserts that the \$3,000 per line proposal should not apply to Allband for several reasons. First, it is the most recent entrant into the industry, which complied with all of the requirements and exhaustive application procedures of the RUS, state commission, and this Commission. It has received numerous regulatory licenses, waivers, and other approvals from both the MPSC and this Commission. It has engineered and constructed a viable, reliable, and long-lasting versatile network meeting all of the requirement and approvals of the RUS and of industry's most up to date standards. Allband has relied upon these approvals in going forward to provide service where no one else would do so, despite the need. Allband asserts that as a matter of law the Commission cannot retroactively change these legal requirements, given Allband's reliance on same, and given the corresponding successful performance of its contractual duties and all other promises by Allband.

The proposed \$3,000 per line limit, if applied to Allband, would also be irrational to the extreme. It may result in extended litigation concerning the rules, and possibly damage actions.

Allband is fully compliant with the rules and regulations of the FCC, the RUS, the MPSC, and is currently receiving funds from the USF, based on FCC rules. Allband's financial viability relies in significant part on mortgages and loans made and tailored by the RUS, which loans have supported Allband's progressive build out in northeast Michigan. Allband is fully compliant with the terms of such mortgage and loan contracts. The proposed USF limitations could result in the default by Allband of its loan commitments to the RUS, a sister agency of the federal government. This would remove the single most significant portion of Allband's financial structure, causing significant financial damage to Allband and the loss of vital communications services to its rural customers. Such a result could hardly be considered as an example of "economic efficiency" or the "reduction of waste". Rather, it constitutes an unusual retroactive "second-guessing" of decisions made by the RUS, and also by the MPSC. The Commission's focus on "waste" insinuates that Allband made bad investment decisions -- decisions that were approved by RUS. To the contrary, however, the underlying premise should be that Allband planned correctly. The underlying Commission premise cannot provide any authority to dissolve Allband's and RUS' investment. Such action would be irrational because it would punish Allband for being successful in its carrying out of the very purposes and objectives of Congress in providing for the USF provisions in the Act.

The ill-defined "reverse auction" proposals would compound the irrationality if it were to result in the taking of Allband's facilities by a large carrier, which has refused for over a century to provide service to Allband's territory. This would represent unjust enrichment to such a bidder, as reward for failing to service the area, to be essentially financed by defaulted RUS loans, to enhance their profits as a private (not local non-profit entity), so they can try to serve local areas by distant bureaucracies having little knowledge of Michigan, let alone its public

safety and public interest issues. The Commission's proposals also do not address rural ILECs like Allband that have already invested in advanced broadband, which do not have a legacy issue involving just copper telephony with aging broadband capabilities.

The Commission's proposals do not comport with prevailing precedent of the United States Supreme Court, which has ruled in analogous circumstances in *U.S. v. Winstar*, 518 U.S. 839; 116 S. Ct. 2432; 125 L.Ed.2d 964 (1996), that such a retroactive change in regulation, even if done by Congress, is not lawful. Such a result would be an unforeseen repudiation of the existing statutes, regulations, procedures, and approvals that Allband conscientiously followed before the RUS, this Commission, and the MPSC, and relied upon. As established by *Winstar*, the Commission should be estopped to take this retroactive action as applied to Allband. These facts strongly suggest that Allband would also have a cause for damages against federal agencies on the basis that such FCC rule changes as are currently proposed breached the government's contractual obligations. Consistent with *Winstar*, Allband would be entitled to damages for lost USF revenues or "expectancy damages," among other damages.

In *Winstar*, financial institutions brought an action against the United States, asserting breach of contract, arising from federal regulatory agencies changing accounting treatments associated with the financial institutions' acquisitions of failing trusts when such changed accounting treatment resulted in significant losses for the acquiring financial institutions. The United States Supreme Court upheld the *Winstar* plaintiffs' claims, holding that the United States was obligated to permit the financial institutions to use the accounting methods on which they had relied, and that the United States breached contracts which provided for such accounting standards. Accordingly, the Court ultimately ordered the United States to pay damages. A series of subsequent cases in the lower Federal courts have followed suit, awarding substantial

monetary damages. *Winstar*'s reach has been broadened significantly beyond cases involving financial institutions and has supported claims made by utility companies against the United States for breach of contract involving oil leases and spent nuclear fuel.

Under *Winstar*, Allband would claim it followed all federal statutes, FCC rules, RUS rules, and State Commission orders to obtain its RUS mortgage loans and provide telephone and broadband service to unserved rural areas in Michigan. The Commission's rulemaking proposals seeking to limit Allband's USF funding would constitute a retroactive change of the regulatory framework to Allband's detriment. Allband would no longer be able to pay its RUS mortgage and to provide its established services to the public. However, such potential claims can be averted by altering the proposed rules to make them prospective and to grand-father Allband to existing rules and USF funding formulas given Allband's preexisting mortgage contracts based upon the existing regulatory framework.

Allband also asserts that some of the Commission's proposals appear to be contrary to and inconsistent with the plain language of the Act, and the objectives and purposes of Congress as stated in the Act. The Commission's proposal to limit its USF support is not supported by the Commission's authority under the Act, and defeats the USF provisions of the Act. Such an action would undercut and be inconsistent with the provisions applicable to the USF, and would impede the goals and objectives of Congress in those provisions. Statutes must be interpreted in accordance with the goals, objectives, and intent of Congress. *Schneidewind v ANR Pipeline Company*, 485 U.S. 293; 108 S. Ct. 1145 (1988). Actions undertaken by federal agencies, which are not supported by the plain language of Congress in federal statutes, are unlawful. *Indiana Michigan Power Co. v. DOE*, 319 U.S. App. D.C. 209, 88 F.3d 1272 (D.C. Cir. 1996); *Northern*

States Power Co., et al v. DOE, 120 F.3d 753 (1997), *Wisconsin Electric Power Co. v. Dept of Energy*, 250 U.S. App. D.C. 128, 778 F.2d 1 (D.C. Cir. 1985).

The Act is quite clear and specific relative to USF matters. Section 254 lays out clearly the principles and policies to be applied “for the preservation and advancement of universal service (Section 254(b), 47 U.S.C. 254(b)). Section 254(b)(1) establishes the principle that “Quality services should be available at just, reasonable, and affordable rates”. Section 254(b)(2) mandates that “Access to advanced telecommunications and information services should be provided in all regions of the Nation”. Section 254(b)(3) provides:

(C) ACCESS IN RURAL AND HIGH COST AREAS.--Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

Section 254(b)(5) requires that “There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service”. Section 254(b)(6) provides that schools, health care providers, and libraries have access to advanced telecommunications services. Section 254(b)(7) provides for other principles as the Joint Board and Commission determine are necessary and appropriate “for the protection of the public interest, convenience, and necessity and are consistent with this Act”. Section 254(d) provides for contributions by carriers “to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service”. Section 254(e) provides that universal service support provided to Eligible Telecommunications Providers “should be explicit and sufficient to achieve the purposes of this section”. Section 254(g) provides in part that certain rates charged by providers “to subscribers in rural and high cost areas shall be no higher

than the rates charged by each such provider to its subscribers in urban areas”. Section 254(h)(1)(A) provides that a carrier should provide services necessary to a “health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State”. Section 254(i) provides that “The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable”.

While Allband recognizes that the Commission has some authority to waive or forebear with respect to certain provisions or rules, Allband asserts that such Commission action with respect to the universal service provisions must be consistent and in furtherance of the clear intent of Congress as stated in the above provisions of the Act, among others. Commission discretion does not extend to undertaking actions that are contrary to, and counterproductive to, the above statutory goals, principles, and mandates.

Yet, several of the Commission’s proposals do not comport with the above statutory mandates. Proposals to curtail and limit funding on virtually a flash cut basis, and to destroy the finances of companies providing a range of advanced services with USF funding in a rural area, does not promote or maintain such services on a comparable basis to urban areas, and at reasonable rates. The proposals also do not provide the contemplated "specific, predictable and sufficient... mechanisms" and funding to promote universal service. Instead, the Commission’s proposed policies will undercut investment returns necessary to provide for universal service, and will degrade and curtail the provision of services to rural areas, including in Allband’s service territory.

The broadband speed requirements the Commission proposes in rural areas (much lower than urban areas) also does not meet the goals of the USF. By setting the bar low, the

Commission appears to be playing into the hands of wireless companies who cannot provide a higher bandwidth as required in urban areas. This is shortsighted and foolish as wireless is not a dependable technology in most rural areas, especially northern Michigan. This does not promote comparable services at reasonably comparable rates as required by the Act.

The Commission's rulemaking proposal cites no authority for the per line limit in the circumstances applicable to Allband, and cites no record or rational basis for determining the specific limit proposed. The Commission's proposed rule provides no rational application to the unique and successful context of Allband, which has a new network that is mostly undepreciated, and is only now filling out the territory, and thus temporarily has a higher dollar per line figure than will be true in the future. The Commission is trying to impose an arbitrary "across the board" figure that simply is irrational and inapplicable to Allband. This would be arbitrary and capricious in violation of the federal Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

Equally disturbing is the apparent lack of definition or explanation for the "exceptions" that might be granted to Alaska, Hawaii, or Indian tribal areas, or "insular areas," all mentioned without standards or criteria. Allband asserts that under constitutional and statutory provisions, and judicial precedent, all existing entities following and relying on existing law, and entering into financial arrangements based thereon, must be "grandfathered in" at their existing cost levels without discrimination, and without a "case by case" analysis having no basis or rationality. Allband requests such treatment in this case, as it must rely on the planned USF revenue stream to meet its loan and mortgage obligations to the RUS.

The doctrine against retroactive regulation and ratemaking is well established in precedent and should be respected by this Commission. For example, on the federal level, see *Board of Public Utility Commissioners, et al v. New York Telephone Co*, 271 U.S. 23; 46 S. Ct.

363; 70 L. Ed. 808 (1926). On the state level, see *General Telephone Co. of Michigan v. Public Service Commission*, 341 Mich. 620; 67 N.W.2d 88 (1954), and *Michigan Bell Telephone Co. v. Public Service Commission*, 315 Mich. 533; 24 N.W.2d 200 (1946). The United States Constitution forbids the taking of property, or confiscation of property, without due process and proper compensation. The Commission rulemaking appears to destroy Allband's ability to meet its expenses and debt service requirements, and to recover its investment and earn a reasonable return in accordance with judicial precedent, *Bluefield Waterworks & Improvement Co. v. PSC of West Virginia*, 62 U.S. 679; 43 S. Ct. 675 (1923). Allband asserts that these provisions would be violated if the Commission in these proposed rules imposed a sudden and unforeseen limitation of \$3,000 per line.

Another important factor is that the Commission's claimed purpose for imposing these rules are unnecessary and will not serve to carry out the purposes and objectives as stated in the proposed rules. It can hardly be argued that Allband, being so small but expanding, has any perceivable impact upon the USF or its surcharges. It can hardly be argued that Allband has not been very successful in carrying out the purposes of the USF as contemplated by Congress.

VI. ALLBAND'S CONSTRUCTIVE RECOMMENDATIONS AND PROPOSED MODIFICATIONS FOR THE COMMISSION'S RULEMAKING PROPOSALS.

The foregoing comments are not meant to negate the Commission's efforts on this subject, or to several aspects of the Commission's rulemaking. In a real way, the comments are intended to aid the Commission in refining and improving the proposals, and to inform the Commission of Allband's situation. Certainly, the purpose of the comment process is to provide all interested and affected entities with this opportunity, and to give the Commission the

opportunity to fine-tune its proposals. In this spirit, Allband offers the following constructive recommendations:

1. PROSPECTIVE APPLICATION:

The proposed rules should have prospective application; in other words, for example, the \$3,000 per line limitation to USF support should not be implemented to entities subject to current approvals, mortgages, etc, based upon USF support above this level; alternatively, the rules should provide for the USF to pay off the mortgages, or guarantee the revenue stream in accordance with current amortization requirements of RUS loans.

2. GRANDFATHER AND EXCEPTION PROVISIONS:

Existing entities that have developed their networks in reliance upon, and in compliance with all requirements of state and federal law, and agency regulations and orders to this point, should be grandfathered in under existing law. A retroactive application of the Commission rules would be unlawful, unreasonable, arbitrary, irrational, and quite frankly, unnecessary and counterproductive. Along this same line, the Commission rules should not provide for a “case by case” evaluation of the rules, pursuant to some ill-defined and unexplained criteria standards, not comporting with present statutes and decisions of state and federal agencies up to this point. Such a process will lead to arbitrary and capricious results, and will overburden the agency, and will lead to unnecessary further litigation.

3. THE REVERSE AUCTION SHOULD BE POSTPONED OR SHOULD NOT APPLY TO AREAS SERVED BY EXISTING ENTITIES WHO HAVE FOLLOWED FEDERAL AND STATE LAWS AND AGENCY ORDERS.

The Commission has not cited applicable authority under the Act for the largely unexplained reverse auction. This process is not discernible by either the plain language of the

Act or by any implied power thereunder. If such a process is aimed at bootstrapping or expanding the agency's authority by order or rule, it should fail as being outside of the agency's power under the Act. If the proposal is aimed at transferring properties from one entity, such as small companies complying with USF provisions, to large companies who refused to serve rural areas, it would be irrational to the extreme, and a post-hoc unconstitutional taking of property without proper compensation, a violation of due process and an unwarranted unearned unjust enrichment to the receiving entity.

4. THE PROPOSED BAR ON ADMINISTRATIVE AND GENERAL EXPENSES IS IRRATIONAL AND ARBITRARY, AND SHOULD BE REMOVED.

The Commission's proposal to eliminate from USF support, Administrative and General expenses is irrational and draconian, and unnecessary. The state and federal statutes, governing communications as well as such things as accounting and tax matters, and the RUS requirements, as well as the present and proposed rules of this Commission, make it perfectly obvious that reasonable levels of these expenses are necessary to run a company, to provide reliable service and maintenance, planning, and compliance. Is all of this to be done free? What is the statutory or common sense basis for this proposal? This proposal is irrational and is not shown to be necessary to accomplish the goals and objectives of the Commission in this rulemaking process.

5. TRANSITION MECHANISMS SHOULD BE FINE TUNED TO ALLOW ADJUSTMENT TO THE RULES OVER TIME RATHER THAN ON A FLASH CUT BASIS.

The Commission should devise common sense transitional mechanisms to permit a reasonable transition to the new regulatory approach to USF funding. Such transitional mechanisms should recognize already established financing commitments and the meeting of such commitments, approaches to uphold rather than destroy the sanctity of contracts (and

certainly contracts entered into by a sister agency, the RUS), to respect the reliance that the existing industry participants placed upon existing law and requirements, among consistent approaches. A “flash cut” approach that does not recognize such a longer-term transition will likely be challenged and be overturned by the Courts.

The Commission should recognize the importance of entities meeting their loan commitments and supporting current issues and useful investments. The Commission should consider depreciation as a variable when studying current HCL support levels and proposed caps. Not all ILECs are equally depreciated; a new company such as Allband, with a modern infrastructure and green-field characteristics, should not be treated the same as other companies with a higher amount of older depreciated plant.

6. REFORM TO AID EXPANSION INTO CONTIGUOUS OR NEARBY UNSERVED AREAS.

The Commission should adopt reforms that assist entities such as Allband to expand its services into contiguous or new areas, which are unserved and include residents who desire service from Allband. Such reforms would increase the scope of Allband's coverage area and would serve the purpose of the USF as stated in the Act.

7. DEVELOPMENT OF CONSISTENT POLICIES INVOLVING THE COMMISSION AND THE RUS.

Conflicting or divergent policies between the RUS and the FCC should be eliminated. RUS only recognizes telephone as a deliverable to receive an infrastructure loan, while the FCC is focused on broadband. Cross collaboration needs to be developed between these two regulatory bodies. Most RUS loans are approved with USF being a required factor. In Allband’s case, it was an essential requirement needed to release loan funds.

8. INCREASE IN USF FINDING.

The Universal Service Fund needs to be increased to bridge the urban/rural divide, and not reduced or made subject to uneconomic short-term requirements. A broader base of support contributions should be implemented, like a USF fee on Internet and other services in addition to telephone services.

VII. CONCLUSION AND RELIEF

Allband requests that the Commission fully review and consider these comments, and amend and revise its proposed rules to comport with the points and recommendations outlined herein. Allband requests such further and consistent relief that is lawful and reasonable.

Respectfully submitted,

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Dated: April 18, 2011

Counsel for Allband Communications Cooperative

Analysis of USF Reform NPRM Released 2/9/2011
COMPANY: ALLBAND COMMUNICATIONS

Line	Description	Source	2010	2011	2012	2013	2014
REGULATED REVENUES							
Revenues - USF Support:							
LN1	NECA-ICLS	3 year forecast	\$386,134	\$390,742	\$388,155	\$385,586	\$383,033
LN2	NECA-LSS	3 year forecast	\$93,769	\$89,314	\$86,124	\$83,048	\$80,082
LN3	USF SNA	From USAC Appendix 1	\$0	\$0	\$0	\$0	\$0
LN4	USF HCL	3yr forecast and USAC Appendix 1	\$605,963	\$ 879,600	\$934,457	\$913,457	\$893,774
LN5	SUBTOTAL -USF	=(Sum LN1 thru LN4)	\$1,085,866	\$1,359,656	\$1,408,835	\$1,382,090	\$1,356,889
LN6	1.3 Loops		134	158	173	178	183
LN7	Annual USF Support per Line	=(LN5 / LN6)	\$8,103	\$8,591	\$8,131	\$7,753	\$7,398
LN7a	Monthly USF Support per Line	=(LN7 / 12)	\$675	\$716	\$678	\$646	\$617
Other Regulated Revenues:							
LN8	Other Interstate Revenues (ie. NECA settlements, Interstate Access, etc.)	Interstate Less (CLS and LSS	\$153,613	\$147,851	\$149,479	\$151,125	\$152,789
LN9	Other Revenue (ie Local, Intrastate Access, etc)	Total Reg Revenue Less Above	\$398,507	\$398,507	\$398,507	\$398,507	\$398,507
LN10	SUBTOTAL - All other Reg. Revenues:	=(Sum LN8 + LN9)	\$552,120	\$546,359	\$547,986	\$549,632	\$551,296
LN 11	TOTAL REGULATED REVENUES	=(LN7 + LN10)	\$1,637,986	\$1,906,014	\$1,956,821	\$1,931,723	\$1,908,185
Regulated Operating Expense, Interest, Other:							
LN12	Op. Expense	From Forecast	\$1,013,131	\$1,028,088	\$1,043,230	\$1,043,230	\$1,043,230
LN13	Interest	From Forecast	\$336,669	\$336,669	\$336,669	\$336,669	\$336,669
LN14	Other	All Other Income Stmt Items	\$0	\$0	\$0	\$0	\$0
LN15	TOTAL OPERATING EXPENSE, INTEREST, ETC	=(Sum LN12 + LN14)	\$1,349,800	\$1,364,757	\$1,379,899	\$1,379,899	\$1,379,899
LN16	Net Income Before Tax	=(LN11 - LN15)	\$288,185	\$541,257	\$576,922	\$551,823	\$528,286
LN 17	Net Investment	3 Year Forecast	\$6,164,589	\$5,922,817	\$5,675,366	\$5,438,252	\$5,211,046
LN 18	ROR	=(LN16 / LN17)	4.67%	9.14%	10.17%	10.15%	10.14%
LN 18a	HCL Cap Revenue Effect	From Forecast			(\$7,900)	(\$19,290)	(\$33,064)
LN 19	TIER	=(LN13+LN16)/LN13)	1.8560	2.6077	2.7136	2.6391	2.5692
NPRM Impacts							
LN 20	High Cost Loop Fund				(\$103,019)	(\$203,723)	(\$302,825)
LN 21	Safety Net Additive				\$0	\$0	\$0
LN 22	LSS				(\$28,708)	(\$55,365)	(\$80,082)
LN 23	ICLS				(\$31,020)	(\$62,980)	(\$94,000)
LN 24	\$3000/Ln Support Limitation	Additional USF reduction based on the \$3000 per line cap			(\$726,312)	(\$525,246)	(\$329,773)
LN 25	Total Support Reduction	=(Sum LN20 thru LN24)	=(Sum LN20 thru LN24)	=(Sum LN20 thru LN24)	=(Sum LN20 thru LN24)	=(Sum LN20 thru LN24)	=(Sum LN20 thru LN24)
LN 25A	Total Monthly Support Reduction Per Line	=(Line 25 / Line 6 / 12)	=(Line 25 / Line 6 / 12)	=(Line 25 / Line 6 / 12)	=(Line 25 / Line 6 / 12)	=(Line 25 / Line 6 / 12)	=(Line 25 / Line 6 / 12)
LN 25B	% Support Reduction Per Line	=(Line 25 / Line 5)	=(Line 25 / Line 5)	=(Line 25 / Line 5)	=(Line 25 / Line 5)	=(Line 25 / Line 5)	=(Line 25 / Line 5)
LN 26	Estimated USF Support to be received if current NPRM is implemented:				\$(428)	\$(396)	\$(367)
					-63%	-61%	-59%
LN 27	Modified Net Income	=(LN16 + LN25)			\$519,776	\$534,776	\$550,209
					(\$312,137)	(\$295,491)	(\$278,394)
LN 28	Modified ROR	=(LN28 / LN 17)			-5.50%	-5.43%	-5.34%
LN 29	Modified TIER	=(LN13+LN27)/LN13)			0.0729	0.1223	0.1731